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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re APOLINAR F., a Person Coming
Under the Juvenile Court Law.

B163635
(Los Angeles County
Super. Ct. No. CK 35347)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

GABRIELA H.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Stanley Genser, Commissioner. Affirmed.

Melissa A. Chaitin, under appointment by the Court of Appeal, for Gabriela H. Janette Freeman Cochran, under appointment by the Court of Appeal, for Apolinar F.

Lloyd W. Pellman, County Counsel and William D. Thetford, Deputy County Counsel for Respondent Los Angeles County Department of Children and Family Services.

Mother Gabriela F. (Mother) and minor Apolinar F. (Apolinar) appeal orders terminating Mother's parental rights and denying her section 388 petition. Mother argues the trial court erred in failing to rule on her section 388 petition and in finding that the exceptions to termination of parental rights under Welfare and Institutions Code¹ section 366.26, subdivision (c)(1)(A) (beneficial relationship with parent) and (c)(1)(E) (sibling relationship) did not apply. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Apolinar was born in April 1998. Apolinar has a heart condition known as "total anomalous pulmonary venous return" with pulmonary obstruction and hypertension. On September 17, 1998, he was recovering from surgery to repair his condition and receiving treatment at UCLA/Harbor Medical Center. At the time, Mother and Apolinar's father, Pascual F., were arrested for delivering heroin; with them in the car was Natalia, Apolinar's two-year-old sister. A hospital hold was placed on Apolinar, and his sister Natalia was taken into protective custody. Natalia was placed with a third cousin. A section 300 petition was filed September 1, 1998. The minors were ordered detained, and reasonable visitation was granted.

On October 6, 1998, Apolinar was still hospitalized. An October 23, 1998 social worker's report stated that Apolinar's foster parent must be specifically trained to care for him, as he required continuous oxygen and daily medication. On November 4, 1998, Apolinar was discharged from the hospital, but returned on November 13, 1998. He was later released to a medical placement foster home.

¹ All statutory references herein, unless otherwise noted, are to the Welfare and Institutions Code.

On November 4, 1998, Pascual was sentenced to 16 months in state prison for the drug offense.² Mother and Father had 1995 arrests and convictions for possession or purchase of cocaine base for sale.

At the jurisdictional hearing November 25, 1998, Natalia was released to her maternal grandfather's care on condition that Mother was not to be alone with Natalia at any time and that Mother was not to visit if she was under the influence of drugs or alcohol. Mother was ordered to random drug-test and take parenting classes. On December 4, 1998, Natalia was found alone with Mother, in defiance of court order. Natalia was ordered back into foster care on December 7, 1998.

At the adjudication hearing held January 4, 1999, the allegations of the petition under section 300, subdivision (b), were sustained. The Department of Children and Family Services (the Department) was to provide the court with a report of Mother's progress in reunification services.

An interim review report prepared for the February 9, 1999 disposition hearing indicated that Apolinar was residing with the C. family. Mother had enrolled in a drug treatment program, but tested positive for cocaine. At the hearing, the court ordered the Department to investigate possible relative placement for Natalia and Apolinar, and continued the matter. At the continued hearing, the court sustained the allegations of the petition under section 300, subdivision (b). In order to reunify, the court ordered that Mother and Father must demonstrate they were able to care for the minors, to meet the physical and emotional needs of the minors, and to maintain stable housing.

A report prepared for the six-month review hearing indicated that Apolinar remained placed with the C. family. Mrs. C. was a registered nurse and was providing excellent care for Apolinar. Apolinar was on numerous medications for his condition. Mother had visited with Apolinar on a weekly basis at Mother's home or a nearby

² Mother was released from custody on the day following her arrest and the charges against her were dropped.

restaurant. Apolinar was also visiting with his sister and relatives during these visits. Mother was attending drug and alcohol counseling with random drug testing, and her tests had been negative. However, Mother had not kept the Department advised of her residence or phone number, and was not attending Apolinar's medical appointments. Father was to be deported to Mexico upon his release from prison, and Mother had told family members that she would flee to Mexico with the children if they were returned to her custody.

At the September 2, 1999 hearing, the court ordered that family reunification services be continued. At an October 14, 1999 hearing, the court found that continued jurisdiction was necessary, there was a substantial probability that the minors would be returned to Mother's care within six months, and that Mother was complying with the case plan.

An April 13, 2000 report prepared for the 12-month review hearing indicated that Apolinar continued to reside with the C. family. Father had been released from prison and deported to Mexico. On January 7, 2000, Mother had informed the social worker that she was going to Mexico for several weeks, but that she would return. Mother had not been seen since that time. Apolinar's foster parents were providing him with excellent care, and he was "closely bonded" with them. Mother had not completed court-ordered counseling, testing, or parenting, and had not been visiting Apolinar consistently. At the April 13, 2000 review hearing, the court ordered further provision of family reunification services, and continued the matter.

A section 366.26/18-month permanency planning report prepared for an October 2, 2000 hearing stated that Mother returned from Mexico on June 24, 2000, and contacted her social worker. Mother had given birth to a child, Jesus, on September 1, 2000. Mother re-enrolled in drug counseling and was random drug-testing again, with her results negative. She attended an Asthma Education class at Harbor UCLA Medical Center, and was reported to be familiar with the use of an oxygen tank. Mother visited with Apolinar on 13 occasions during July and August 2000, but only saw him once in

September 2000, apparently because of a bus strike. Meanwhile, Apolinar was receiving excellent care with his foster family; the foster family had indicated they wished to adopt Apolinar. Dr. Baylen of UCLA/Harbor Medical Center reported that Apolinar needed a stable housing situation and a caretaker proficient in tending to his needs.

At the October 2, 2000 hearing, the court ordered the matter continued. At the continued hearing held October 5, 2000, the court ordered unmonitored day visits up to five hours per day once Mother had demonstrated she was proficient with administering Apolinar's medication.

On February 15, 2001, Mother filed a section 388 petition. At the hearing held the same day and at a subsequent hearing held March 14, 2001, the court ordered the Department to investigate and prepare a report concerning the petition and set a hearing date for August 6, 2001.

An April 3, 2001 report prepared for the permanency planning hearing indicated that Mother was currently residing with a friend and sleeping on the couch. She was currently working caring for three children from 8:00 a.m. to 6:00 p.m. Mother had completed two parenting programs, individual counseling, and continued to randomly drug-test. Apolinar had been referred to Regional Center for a multidisciplinary evaluation in order to determine his current levels of cognitive, pre-academic, language, social, emotional, and motor functioning. He was described as a child "at great risk for developmental delays." However, he was doing well in his current placement with the C. family, referring to his foster father as "papa" and his foster mother as "mama." Mother visited once weekly for approximately two hours. She interacted appropriately with Apolinar, and Apolinar did not cry when she left. On three occasions when Mother took Apolinar out, he came home with a cold or was not appropriately dressed.

The foster parents were interested in adopting Apolinar. In March 2000, an adoption assessment had been completed. The foster family had developed a strong bond with Apolinar. The report recommended that Mother's parental rights be terminated because 43 months of reunification services had been provided, she had only taken eight

months of individual counseling and drug testing, and Apolinar was a child with special medical needs that Mother was not capable of handling.

Family reunification services were terminated on May 17, 2001, due to the inability or unwillingness of Mother and Father to provide adequate care. The court ordered that Mother could have weekend visits when she obtained appropriate housing and bedding for Apolinar.

The section 366.26 report prepared for the September 13, 2001 hearing indicated that Apolinar was no longer a client of Regional Center, having attained and maintained age-appropriate developmental skills. He was attending a special education school, and had a strong bond with the other children in his foster home. Apolinar spent a month in respite care from mid-June to mid-July 2001 while his foster parents were out of the country, and during that time Mother did not visit him. Since the foster parents have returned, Mother has visited once weekly.

A report prepared for the continued section 366.26 hearing of November 15, 2001, indicated that Mother had moved into a studio apartment, which the social worker observed had a bed, crib, dresser, and couch. However, the social worker noted the refrigerator was almost empty. Mother was working two days a week cleaning houses and earning \$195 per week. Natalia told the social worker Mother's boyfriend had slapped her on the face. Mother denied her boyfriend was living there. The social worker made an unannounced visit and observed men's clothing in the closet, and Mother admitted she was residing with her boyfriend. Mother denied her boyfriend hit Natalia. On a return visit, the social worker was able to verify that the boyfriend had moved out. Because of the concerns raised by Mother's current situation, the Department had not liberalized her visitation to include weekend visits. Meanwhile, Apolinar continued to thrive in his foster home.

An evaluation prepared by the Harbor/UCLA Child Development Clinic indicated that Apolinar was behind in his language skills. He had difficulty finding words for common objects, although he understood the names of objects when spoken to. Apolinar

evidenced additional developmental delays in the area of memory, coordination, and visual and perceptual skills.

A section 366.26 report prepared for a January 10, 2002 hearing indicated that since the November 15, 2001 hearing, Mother had visited Apolinar five times, but had not visited since December 28, 2001. A supplemental report prepared for a January 31, 2002 hearing date indicated the updated adoption assessment of November 29, 2001, had identified adoption with the C. family as the permanency alternative. The social worker indicated the home study was in progress and should be completed by early March 2002. At the January 31, 2002 hearing, the court set the section 366.26 hearing for May 16, 2002.

The status review report prepared for the May 16, 2002 hearing indicated that since the last hearing, Mother had continued to visit Apolinar on a consistent basis. However, Apolinar returned from one visit dirty and after another visit Apolinar had a fever and was vomiting. Apolinar referred to his mother as “Gabriela” and his foster mother as “mama.” Apolinar was not upset when the visits with his Mother ended. He was receiving speech therapy twice a week. Apolinar had adjusted well to his placement, and his demeanor was pleasant and playful.

The updated section 366.26 report for the May 16, 2002 hearing indicated that the adoptive home study was not yet completed as the social worker was waiting for the foster parents’ chest x-rays. At the hearing, the court continued the matter pending receipt of the completed home study, and identified adoption as the permanent plan. An interim review report prepared for the June 18, 2002 hearing indicated the home study was completed. At the hearing, the court set a contested section 366.26 hearing for July 23, 2002.

On July 2, 2002, Mother moved for a bonding study. In addition, she filed a section 388 petition contending she had complied with all court orders, visited Apolinar regularly, and maintained suitable housing. She requested the return of Apolinar to her custody. Mother submitted materials indicating that she had been attending, since

January 2002, Rainbow Services, Ltd. and receiving counseling. She had completed parenting classes, taken substance abuse counseling, and had been tested for substance abuse during 1999.

At the July 23, 2002 hearing, the court denied the motion for a bonding study without prejudice. The court noted that the evidence in support of the motion was insufficient to support a bonding study. Mother's limited visitation and Apolinar's limited attachment to her was outweighed by the detriment of failing to adopt a permanent plan with the family that had been caring for Apolinar since he was six months old. Mother's visit had been limited to once weekly and there was a period of time when no visitation took place.

With respect to Mother's section 388 petition, the court stated that its tentative ruling was to deny the petition on the grounds it was untimely and did "not state new facts that were not present at the time [] or sufficient new facts that the child's best interest would be served." When counsel addressed the timeliness issue, the court stated that it had misspoken and that it intended to put off the hearing on the section 388 petition until after the section 366.26 hearing on the grounds the section 366.26 hearing might moot out the section 388 petition. "The issues raised by [the] section 388 petition are really going to be part and parcel of the [section 366.]26 hearing, you raised in your [section] 388 [petition and section 366.26] (c)(1)(A) issue. And if the (c)(1)(A) flies [at] the [section 366.]26 hearing then it lends weight to your [section] 388 [petition]. If you can't establish a (c)(1)(A) defense at the [section 366.]26 hearing then there's no merit to your [section] 388 petition." The court trailed the section 388 petition.

The court took testimony on the contested section 366.26 hearing, which covered several days.

Griselda Subias, the social worker, testified that she had observed a visit between Mother and Apolinar. The last visit was the Friday before the hearing (July 19, 2002), and took place at Burger King. Subias observed that Apolinar would go off to the play area, play, and then come back and sit in her (Subias's) lap. Apolinar also sat in

Mother's lap. She did not observe Mother hug or kiss Apolinar, although she tried to fix some glasses that he had broken. This was the only visit between Mother and Apolinar that Subias has observed. Subias had observed Apolinar display affection for the foster mother on numerous occasions. Subias thought Apolinar was adoptable because he did not have any severe developmental delays, he was under the age of five, and there was a family willing to adopt him.

Subias has been on Apolinar's case since February 2001. She visited him eight times in 2001, and five times in 2002. She has observed him with his foster siblings playing.

The foster father, Mr. C., testified that he was the primary caretaker for Apolinar when his wife, Mrs. C., was at work. They have three other children: three daughters, Elishia, age eight, Marcela, age six, and Lucy, age five. Elishia is their biological child. Mr. and Mrs. C. were in the process of adopting Marcela and Lucy. All of the children were very close. They hug each other and share toys with each other. Mr. C. wanted to adopt Apolinar, whom he loved as his real son. Apolinar called Mr. C. "daddy."

Mr. C. has observed visits between Mother and Apolinar. He began keeping records in January 2002 consisting of the date of the visit and the length. On April 4, 2002, when Apolinar returned home his back was wet and he was very dirty. Later that evening Apolinar vomited, and he had a runny nose. On July 11, 2002, Apolinar was again returned dirty, with his back wet and a runny nose. Apolinar was not upset at having to part from his mother at the end of the visit. Mr. C. was always present when Mother came to pick up Apolinar. Sometimes Apolinar would be excited to see Mother, but not always. Because most of the visits between Mother and Apolinar were outside of the C.s' home, Mr. C. did not know the quality of the interaction between Mother and Apolinar.

Mrs. C. testified that Apolinar called her "mommy." She wanted to adopt Apolinar because he was a part of her family. Mrs. C. observed Apolinar outside the

courtroom sitting with his mother and brother Jesus. He was smiling. She saw that Jesus and Apolinar were playing separately.

Victoria Montoya, a social worker, observed a visit between Apolinar and Jesus. The visits lasted about an hour and 10 minutes. They were playing with each other. Apolinar called Jesus “Tuz.” She observed Apolinar with Mother, playing with stickers. He was laughing and smiling. At one point, Mother picked Apolinar up.

Mother testified that she had five children, and that she wanted Apolinar returned to her custody. At first she visited Apolinar at the social worker’s office. About three months after Apolinar had been taken from her custody, she began to have unmonitored visitation. Mr. C. would bring Apolinar to her house. Later, the arrangement changed so that the visits were held at the C.’s home. Because Mother’s other child, Jesus, was so active, they would have the visits outside. Mother asked to take Apolinar to the Burger King because these visits were difficult. After her trip to Mexico in 2000, she resumed visitation with Apolinar. She began to take Apolinar out for the whole day. After Natalia was slapped by Mother’s boyfriend, her visitation with Apolinar was monitored again. She called Apolinar “Poli” and he called her Mama.

She believed Apolinar was bonded with her because as soon as he saw her, he would run to her and give her hugs and kisses. Jesus and Apolinar played together. She took Apolinar to Burger King on their visits. She would take him to her house and cook and feed him there, and give him the medication he was supposed to take once a day. Mother’s oldest two children lived in Mexico with her mother-in-law. She has not been to Apolinar’s preschool, although she knows where he goes. When Apolinar was in the hospital for two months after he was detained, she went there all the time. She would sleep there every night. When he got out of the hospital, she went to several of his medical appointments. When Apolinar was in respite care, the foster family did not tell her they were out of town. She would call the social worker, but the social worker did not call her back. The social worker gave her an address where she could visit Apolinar, but Mother was unable to find the address.

At the conclusion of this testimony, the court indicated that it had reviewed the file and determined that it needed to resolve the section 388 petition before it finished the section 366.26 hearing. The court stated that assuming Mother had completed her reunification plan (drug counseling and parenting), the court wanted to hold a concurrent hearing wherein Mother would present evidence on why it would be in the best interests of Apolinar to return him to Mother.

Mother moved for a mistrial and for recusal on the grounds the section 388 hearing should have been conducted prior to the section 366.26 hearing, and that taking concurrent evidence as the court was now suggesting, was impossible as the evidence on the section 366.26 hearing was close to being concluded. The evidence on the section 388 petition was therefore tainted; furthermore, the court should have ordered a social study report on the section 388 petition. The court denied the motion on the grounds that nothing in section 388 indicated that a social study needed to be ordered; the court had previously indicated that it would resolve the section 388 issue before it ruled on the section 366.26 issue; the section 388 petition had been filed on the eve of the section 366.26 hearing, thus there were overlapping issues and evidence relevant to one issue was relevant to another; and that the court's intention to defer ruling on the section 366.26 issue would ensure that appropriate standards were followed for each issue.

On August 15, 2002, during the course of the proceedings, the court ordered a bonding study to assess the bonds between Apolinar and Mother and between Apolinar and Jesus, and in order to assess whether it would be detrimental to sever Mother's parental rights, and whether it would be in Apolinar's best interests to have continued contact with Jesus. Pursuant to Evidence Code section 730, Dr. Alfredo Crespo, a clinical psychologist, submitted a report dated September 30, 2002, based upon interviews, observations, and testing. At a meeting in his office, Dr. Crespo observed that Apolinar would run to his mother with a "big smile" upon his arrival with his caretakers, but would then engage in "parallel play" with Jesus. Jesus was aggressive with Apolinar, and "became increasingly rough in his approach to the play with his

brother [Apolinar] and was occasionally seen hitting [Apolinar] and grabbing toys away from him. [Mother] often intervened by holding Jesus' arms but she seemed either ineffective protecting [Apolinar] from Jesus' apparent display of jealousy over [Mother]." Mother told Dr. Crespo that her visits with Apolinar had been limited to Burger King. Apolinar smiled with Mother picked him up and put him in her lap and looked through a bag she had for toys.

Foster Father Mr. C. confirmed that Apolinar did not speak much, but that he understood commands. When Foster Mother Mrs. C. entered the office, Apolinar greeted her with a smile and called her "mommy." Upon completion of the interviews with the foster parents, Mother was interviewed in the presence of the children. She was distracted by a conflict between the two children over a bracelet that Apolinar had found in the waiting room, but that Jesus insisted on having. Apolinar was asked to wait with the foster parents, and Jesus threw a tantrum in response to the separation. Jesus was difficult to soothe.

Mother agreed that Apolinar had received good care in the foster home, but denied that Apolinar had special needs, insisting that he was "fine." Mother wanted Apolinar returned to her care. She denied that Apolinar was attached to his foster parents. Apolinar never wanted to go back to the foster parents after visiting with her at Burger King.

Dr. Crespo concluded that the foster parents' desire to adopt was based upon their bond with Apolinar. On the other hand, Apolinar "may be expected to be at risk for significant emotional distress if he were to be placed with his mother, and separated abruptly from his psychological parents, which would likely occur given [Mother's] apparent limits in general sophistication and specifically in appreciating her son's emotional needs vis-à-vis his psychological parents. . . ." Furthermore, "if [Mother's] parental rights were terminated at this time [Apolinar] would be unlikely affected greatly given that his life circumstances would change little, especially if his birth mother is

permitted to continue to visit with him.” However, denying Mother visitation would not cause Apolinar emotional distress.

At the continued hearing November 25, 2002, Dr. Crespo testified that in his opinion, there was little attachment between Apolinar and Mother. Instead, they had a visiting relationship. By “visiting relationship,” Dr. Crespo meant that Apolinar knows who Mother is, they have certain routines and interactions, such as Apolinar greeting Mother by going through her bag and seeing what kind of goodies he might find in it. Such a relationship is not as important as a relationship with an attachment figure. Dr. Crespo observed Apolinar with Mother for approximately 15 minutes to one-half hour. Dr. Crespo believed this observation, coupled with his review of the documents and interview of Mother and Mr. and Mrs. C., was a sufficient foundation for his conclusions. Jesus displayed jealousy towards Apolinar for Mother’s affection. On the other hand, Dr. Crespo believed that Apolinar was more attached to the C.s than he was to his Mother. When Apolinar played in Dr. Crespo’s office, he attempted to include Mr. C. in his activity. There was no such attempt to include Mother in his play. Because of Mother’s visitation pattern (gone for six months; visits increasing in frequency right before court hearings), it would be difficult for Apolinar to attach to her. Apolinar did not appear to be particularly distressed when he separated from Mother or Jesus. Dr. Crespo did not believe it would be detrimental to terminate parental rights. The proposed adoptive parents, the C.s, are better able to care for Apolinar’s special health needs. From what Dr. Crespo observed, Mother was not very good at handling any conflicts between Jesus and Apolinar.

Mother argued that the first prong of section 366.26, subdivision (c)(1)(A) had been met because of her regular visitation and contact with the child. The social worker failed to take into account the second prong, as she made a recommendation of adoption without even seeing Mother and Apolinar interact. She further argued that Dr. Crespo’s report was not reliable because it relied on the Department’s reports, which consisted of

suspect social worker recommendations. For 43 months, Mother has received reunification and had consistent contact with Apolinar.

The court found that the quality of Mother's visits, though frequent, did not rise to the level of a parent-child relationship. There was no significant sibling relationship with Jesus. Instead, Apolinar looked to his foster parents for nurturance and support. In making these findings, the court gave more weight to Dr. Crespo's percipient observations than it did to his reliance upon reports. The court found Apolinar adoptable and terminated parental rights. Mother appealed the order terminating her parental rights, and Apolinar appealed the section 388 petition and the termination of parental rights.

DISCUSSION

Mother contends the trial court erred in failing to find the "benefit" exception of section 366.26, subdivision (c)(1)(A) applied, or that the exception of subdivision (c)(1)(E) applied due to Apolinar's sibling relationship with Jesus. Apolinar argues the dependency court prejudicially failed to rule on the pending section 388 petition, and erred in finding the exceptions of section 366.26, subdivisions (c)(1)(A) and (c)(1)(E) did not apply. Mother joins in Apolinar's arguments.

DCFS argues that Apolinar has no standing to appeal the section 388 petition; that Mother cannot raise this issue on appeal because it is not encompassed within her notice of appeal; and that Mother and Apolinar waived their right to appeal the dependency court's failure to rule on the section 388 by failing to raise the issue in the trial court. DCFS also argues that the benefit exception of (c)(1)(A) does not apply because even if Mother could show that she had a significant parent/child relationship with Apolinar, there is no evidence that continuing contact with her would outweigh the benefit he would receive from a permanent adoptive home with his caretakers. Furthermore, the sibling relationship exception of (c)(1)(E) does not apply because the extent of Apolinar's relationship with Jesus is limited, and there is no evidence of detriment to Apolinar if the relationship were terminated.

I. NO ERROR WITH RESPECT TO MOTHER’S SECTION 388 PETITION.

A. The Parties May Appeal the Dependency Court’s Failure to Rule on the Section 388 Petition.

Generally, a parent who is an aggrieved party may appeal a judgment in a juvenile dependency matter. (*In re Frank L.* (2000) 81 Cal.App.4th 700, 703.) To be aggrieved, a party must have a legally cognizable interest that is injuriously affected by the court’s decision. (*In re Carissa G.* (1999) 76 Cal.App.4th 731, 734.) The injury must be immediate and substantial, and not nominal or remote. (*In re Joshua S.* (1986) 186 Cal.App.3d 147, 150.) We liberally construe the issue of standing and resolve doubts in favor of the right to appeal. (*Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 540.)

A ruling on a section 388 petition is a separately appealable order. (§ 395; *In re Ronald V.* (1993) 13 Cal.App.4th 1803, 1807, fn. 2.) “[A]ppellate jurisdiction is dependent upon the filing of a timely notice of appeal.” (*In re Megan B.* (1991) 235 Cal.App.3d 942, 950.) Mother did not specifically appeal from the failure to rule on the section 388 petition. Here, however, the court did not expressly rule on the section 388 petition; thus, an appeal from an order denying such petition would have been a futile act. We therefore construe the notice of appeal to include the failure to rule on the section 388 petition.

Apolinar, who separately appealed the section 388 “order,” contends he has standing to assert the alleged error with respect to the section 388 petition because he is a party aggrieved by the court’s failure to rule on the petition; the issue in such a petition is in the best interests of the child. In her petition, Mother asked the court to modify the order terminating reunification services and return Natalia and Apolinar to her, and relief under the petition would have resulted in a consequence to Apolinar’s legally cognizable relationship with Mother. (See *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 948.) We agree. Although the parent’s interest at the section 388 stage is continued reunification, the standard for granting of the section 388 petition is whether it would be in the best

interests of the child. Thus, the child has an interest in whether a section 388 petition is granted. (See *In re L. Y. L.*, *supra*, at pp. 948-949 [parent has standing to assert sibling relationship exception under section 366.26, subd. (c)(1)(E) because of immediate and substantial consequence to parent].)

Apolinar lastly contends he did not waive the issue in the dependency court, instead asserting it at every juncture. We agree. Generally, the waiver doctrine is based upon the rationale that the trial court should have an opportunity to correct the error. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) Here, however, there was no opportunity to bring the matter to the trial court's attention as the facts indicate the matter escaped the parties' attention as the focus was on termination of parental rights. After such rights were terminated and the court issued its ruling, there was no point to asking for a ruling on the section 388 petition. Therefore, we find no waiver.

B. On the Merits, the Failure to Rule on the Section 388 Petition is Not Error Because Mother Failed to Demonstrate Sufficiently Changed Circumstances.

Section 388 provides, in pertinent part, that any parent of a dependent child of the juvenile court, "may upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of the court previously made" (§ 388, subd. (a).) Section 388 serves as an "escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) "[I]t provides a means for the court to address a legitimate change in circumstances" to afford the parent one last opportunity to reinstate reunification services prior to final resolution of custody status. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

After the court terminates reunification services, the parent's interest in the care, custody and companionship of the child is no longer paramount. The focus shifts to the needs of the child for stability and permanent placement; there is a rebuttable

presumption that continued foster care is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317.) A section 388 motion requires a two-step determination. First, the moving party must show a genuine, significant and substantial change of circumstances or new evidence. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. at 529; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451; *In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577.) Second, the movant must prove the undoing of the prior order would be in the best interests of the child. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. at 529.)³

Among the factors considered by the court in determining the best interests of the child are: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

Nowhere does Mother, or Apolinar, argue that they did not receive a hearing the section 388 petition. Rather, they argue that the court’s failure to *rule* on the section 388 petition before taking testimony on the section 366.26 termination issue was prejudicial, and that a section 366.26 hearing is not an adequate substitute for a section 388 hearing.

³ A party filing a section 388 petition is not automatically entitled to a full hearing on the petition. The moving parent must make a prima facie showing of changed circumstances or new evidence, which might require a change in prior order. (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1799.) The movant need only show “probable cause” that a hearing would promote the best interests of the child. (*In re Hashem H.*, *supra*, at p. 1799; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.) Here, Mother’s entitlement to a hearing is not at issue, as the dependency court impliedly determined that Mother was entitled to a hearing by taking evidence concurrently on the section 388 petition and the section 366.26 termination issue. Thus, the facial sufficiency of her petition is not at issue, but rather the focus is the substantive merits of whether changed circumstances in fact exist warranting the granting of further reunification services.

(See, e.g., *In re Hashem H.*, *supra*, 45 Cal.App.4th at p. 1800; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 433.)

In *Hashem H.*, the mother filed a section 388 petition on the eve of the section 366.26 hearing, on the grounds she had successfully undertaken a round of psychotherapy and had made progress on such issues as problem solving, parenting, and communication. (*In re Hashem H.*, *supra* 45 Cal.App.4th at pp. 1797-1798.) The court denied hearing on the petition on the grounds there was no evidence of successful completion of psychotherapy. (*Id.* at p. 1798.) On appeal, DCFS argued there was no prejudice in denying the hearing on the section 388 petition, because the court had before it at the section 366.26 hearing the evidence presented by the mother's psychotherapist. (*Id.* at p. 1800.) *Hashem* found this was inadequate, because the focus of a section 388 petition is reunification, while a section 366.26 hearing focuses on the selection of a permanent plan. "During the reunification period, there is a presumption that the child will be returned to parental custody. . . . Once reunification services are terminated, the focus shifts to the needs of the child for permanency and stability, and the court need not continue to consider reunification at the section 366.26 hearing." (*Ibid.*) Similarly, in *Aljamie*, the dependency court failed to hold a hearing on a section 388 petition; DCFS again argued no prejudice because of the concurrently held section 366.26 hearing. (*In re Aljamie D.*, *supra*, 84 Cal.App.4th at p. 433.) The argument was rejected on the grounds that the evidence presented at the section 366.26 hearing was not a substitute for a hearing on alleged changed circumstances. (*Ibid.*)

Both *Hashem* and *Aljamie* are distinguishable on the grounds that in each case, *no* hearing was held on the section 388 petition. In the instant case, counsel was advised that evidence would be presented concurrently. Counsel was on notice to present evidence on the section 388 issue, and was not denied an opportunity to do so. Thus, there can be no prejudice from the different focus on the evidence on the two issues, which is the rationale underlying *Hashem* and *Aljamie*. We therefore evaluate the merits of the section 388 petition to determine whether Mother demonstrated changed circumstances.

The extent of Mother's relationship with Apolinar and Apolinar's relationship with Jesus was the focus of the evidentiary presentation. Mother contended her section 388 petition should be granted because of her consistent visitation, success at substance abuse counseling, and educational efforts to learn how to handle Apolinar's medical needs. She also sought to demonstrate that she had developed a strong bond with Apolinar through consistent visitation. However, the *Kimberly F.* factors have not been demonstrated in Mother's 11th-hour attempt to forestall permanency planning for Apolinar, who has been in his current placement for over four years.

The seriousness of the problem leading to dependency -- Mother's drug use and sale of drugs with her children in the car -- apparently has been resolved, but other issues remain after four years. Mother has not demonstrated parenting skills adequate to moderate the needs of Apolinar, who is fragile and needs constant medication and supervision for his special needs, and she has not demonstrated mastery of the care required for Apolinar. Her visitation with him has never escalated sufficiently to demonstrate any ability on Mother's part to adequately care for Apolinar's needs. On the other hand, Apolinar is currently with a loving, caring family well versed in his needs, and he has bonded strongly with them. Mother has failed to demonstrate that further reunification is warranted.

II. NO ERROR WITH RESPECT TO TERMINATION OF PARENTAL RIGHTS.

A. The Benefits Exception of Section 366.26, Subdivision (c)(1)(A) Does Not Apply.

Mother contends⁴ that she had a parent-child bond with Apolinar developed through consistent visitation and that Apolinar would benefit from continuing the relationship, which supports application of the benefits exception of section 366.26, subdivision (c)(1)(A). Mother points to specific facts to support her contention: She had

⁴ Apolinar joins in Mother's arguments.

unmonitored visitation with him at Burger King; the social worker observed Mother and Apolinar outside the courtroom prior to the hearing, playing and smiling with Jesus; when Mother had Apolinar at home she cooked his meals, dressed him, helped him with potty training, and gave him his medication. Mother assails the social worker's recommendation of adoption because such recommendation was based upon flawed and limited observations, as the social worker never saw Apolinar and Jesus interact. Similarly, Dr. Crespo's evaluation is of limited utility because Dr. Crespo only observed Apolinar with Mother for 15 to 30 minutes, while Jesus was present. Dr. Crespo never observed Apolinar alone with Mother and opined that termination of parental rights was appropriate, even after observing Apolinar run to his Mother with a big smile.

The Department contends that the dependency court correctly concluded that the relationship between Apolinar and Mother did not rise to the level of a parent-child relationship and the quality of the relationship between them did not outweigh the benefit Apolinar would receive from a permanent adoptive home. The Department contends that Mother cannot satisfy the first prong of the benefits exception, i.e., the existence of a parent-child relationship: Apolinar had been out of Mother's care for over four years; Mother went to Mexico for six months during early 2000, during which time she had no contact with Apolinar; in May 2001, Mother was granted weekend overnight visits if she obtained appropriate housing and bedding, but she failed to take advantage of this liberalized visitation; Mother did not visit Apolinar while he was in respite care; visitation was limited after Mother's boyfriend slapped Natalia; and although she began visiting regularly before the section 366.26 hearing, Mother never took full advantage of her visitation, instead limiting her visits to one to two hours. Even if a parent-child relationship sufficient to satisfy the first prong of the benefits exception can be shown, Mother cannot establish that there is any benefit to Apolinar from continuing the relationship sufficient to outweigh the benefits of a permanent adoptive home. Apolinar is medically fragile; Dr. Crespo found Mother's relationship with Apolinar to be nothing more than a "visiting relationship"; and Apolinar is bonded with his foster family, who

understands and can accommodate his medical needs. Lastly, any attempts by Mother to attack the credibility of witnesses are inappropriate at the appellate level, as this court does not reweigh the evidence.

At the section 366.26 hearing, the dependency court is required to select and implement a permanent plan. If the child is likely to be adopted, adoption is the preferred permanent plan. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; *In re Edward R.* (1993) 12 Cal.App.4th 116, 122.) The standards to be applied at the section 366.26 hearing require the dependency court to find, by clear and convincing evidence, the minor will likely be adopted if parental rights are terminated. (*In re Tabatha G.*, *supra*, 45 Cal.App.4th at page 1164; § 366.26, subd. (c)(1).) To invoke the section 366.26, subdivision (c)(1)(A) exception, a parent has the burden to show that he or she “ha[s] maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship.” The burden is on the parent to prove that termination of parental rights would be detrimental to the child. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.)

In re Autumn H. (1994) 27 Cal.App.4th 567, 575, addressed the standard to be applied in determining if a parent/child relationship should continue under the section 366.26, subdivision (c)(1)(A) exception. “[W]e interpret the ‘benefit from continuing the [parent/child] relationship’ exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” *Autumn H.* cautioned that interaction between natural parent and child will “always confer some incidental benefit to the child. The significant attachment from child to parent results

from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. [¶] . . . The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond.” (*Autumn H.*, *supra*, at pp. 575-576; accord, e.g., *In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1155-1156.)

With respect to the need for day-to-day contact, *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 stated the beneficial parent-child concept described in *Autumn H.* was “a relationship characteristically arising from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship. . . . The *Autumn H.* standard reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist, one of those exceptional circumstances being the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child's need for a stable and permanent home that would come with adoption. That showing will be difficult to make in the situation, such as the one here, where the parents have essentially never had custody of the child nor advanced beyond supervised visitation. The difficulty is due to the factual circumstances of the parents in failing to reunify and establish a parental, rather than caretaker or friendly visitor relationship with the child.” (Accord, *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811-812.)

The *Autumn H.* standard is challenging to meet and it is difficult to establish that the exception of subdivision (c)(1)(A) applies. *Jasmine D.* explained: “The Legislature

emphasized the exceptional nature of all the circumstances identified in section 366.26, subdivision (c)(1) by revising the statute in 1998 to require the court to find not only that one of the listed circumstances exists, but also that it provide ‘a compelling reason for determining that termination would be detrimental to the child.’ (Stats. 1998, ch. 1054, § 36.6[, p. 6365].) This amendment . . . makes it plain that a parent may not claim entitlement to the exception provided by subdivision (c)(1)(A) simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349.) In *Jason E.* the court stated: “For this exception to apply, it must be shown that there exists ‘a significant, positive, emotional attachment from child to parent’ and that relationship of the parent to the minor is one of parent and child rather than one of being a friendly visitor or friendly non-parent relative such as an uncle. [Citation.]” (*In re Jason E.* (1997) 53 Cal.App.4th 1540, 1548.) Mere friendship between parent and child is insufficient, as such a relationship does not “resemble the daily nurturing that is characteristic of a parental relationship.” (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.)

Beatrice M. is instructive in this regard. In *Beatrice M.*, twin girls were removed from their mother’s care at birth due to a positive toxicology screen and placed with a maternal aunt. By the time of the 18-month review hearing, the mother had completed drug rehabilitation, but still returned positive drug tests. (*In re Beatrice M.* (1994) 29 Cal.App.4 1411, 1414.) She was unable to verify regular employment, and began to miss her AA/NA meetings and failed to appear for drug testing. Reunification was thereafter terminated. (*Id.* at p. 1415.) By the time of the contested section 366.26 hearing nearly a year later, however, the mother had been sober and had been visiting the girls. She filed a section 388 petition eight months later, seeking reunification on the grounds she had moved into the apartment below the girls; had been visiting; had a job with benefits; the girls were affectionate with her and called her “mommy.” (*Id.* at pp. 1415-1416.) The petition was summarily denied on the grounds it was not in the girls’ best interests.

(*Id.* at p. 1416.) Parental rights were thereafter terminated. (*Ibid.*) The *Beatrice M.* court concluded that “frequent and loving contact” was not sufficient to establish the exception applied. The court noted: “No matter how loving and frequent their contact with the girls, [the mother] had not occupied a parental role in relation to them at any time during their lives.” (*Id.* at pp. 1418-1419.)

The same could be said in the instant case. Although Mother’s visitation with Apolinar has been checkered, she has managed to maintain regular contact with him over more than a four-year period. However, in four years, the visits have never risen above much more than regular outings to Burger King. Mother and Apolinar do share an affectionate bond; however, they are nothing more than “friendly visitors.” In addition, the record is unclear whether Mother understands or can fully accommodate Apolinar’s medical needs or appropriately mediate between Apolinar and his obviously more aggressive sibling Jesus. On the other hand, Apolinar is in a loving home where he has bonded with his caretakers, who are more than adequately trained to meet his special needs. We find no error.

B. The Sibling Exception of Section 366.26, Subdivision (c)(1)(E) Does not Apply.

The sibling relationship exception set forth in section 366.26, subdivision (c)(1)(E) became effective on January 1, 2002, and is the only vehicle a parent can use to raise the sibling relationship as a reason to preclude the termination of parental rights. The exception applies where “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subdivision (c)(1)(E).)

Section 366.26, subdivision (c)(1)(E) requires a two-step analysis. First, the court determines whether terminating parental rights would substantially interfere with a sibling relationship, evaluating the nature and extent of the relationship including whether the children were raised in the same home, share significant common experiences, and have close and strong bonds. Second, if the court determines that terminating parental rights would substantially interfere with the sibling relationship, the court then weighs the child's interest in continuing the sibling relationship against the benefit the child would receive if adopted. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 951-952.)

As explained in *In re L.Y.L.*, “To show a substantial interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child. Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment on termination, there is no substantial interference with that relationship.” (*In re L. Y. L.*, *supra* 101 Cal.App.4th at p. 952, fn. omitted.) The juvenile court's duty is to “balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer. [Citation.]” (*Id.* at p. 951.)

In the instant case, the evidence of a sibling relationship between Jesus and Apolinar was weak. They had not been raised in the same home, and Apolinar's health problems demonstrate that he and Jesus were children of different needs. Although they would meet and play at the Burger King, Jesus was antagonistic towards Apolinar, who was a frail child. Dr. Crespo observed Jesus and Apolinar to engage in “parallel play,” i.e., they were playing at the same time, but by themselves. Jesus was jealous of Mother's attention and aggressive when Apolinar found something in the waiting room (a bracelet) that Jesus wanted. Their interaction does not describe a strong sibling relationship such that Apolinar would suffer a detriment if it were terminated. On the other hand, Apolinar has an opportunity to obtain adoptive placement in a loving and

caring home where he has resided since he was seven months old. Thus, even if we were to find detriment from terminating the relationship, it would outweigh the benefit to Apolinar of being adopted into the C. family.

DISPOSITION

The order of the Superior Court is affirmed.

MUÑOZ (AURELIO), J.*

We concur:

JOHNSON, Acting P. J.

WOODS, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.